

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
June 24, 2009 Session

**WILLIAM BREWER v. THE METROPOLITAN GOVERNMENT OF
NASHVILLE AND DAVIDSON COUNTY, TENNESSEE**

**An Appeal from the Chancery Court for Davidson County
No. 06-1179-II Carol L. McCoy, Chancellor**

No. M2008-02307-COA-R3-CV - Filed November 30, 2009

This appeal involves a non-monetary retirement benefit for a retired police officer. The plaintiff was a police officer for many years with the defendant municipality. He received a 25-year service pension upon his retirement. Under the municipality's policies, upon 25 years of service, a retiring officer may receive a gun and badge as a gift from the department. Accordingly, when the plaintiff retired, he requested a gun and badge. The department denied the request because some of the time used to comprise the officer's 25 years of service for pension purposes was accumulated unused sick leave. After the denial of his request, the officer filed a petition for writ of mandamus in the trial court, asking the trial court to order the defendant to abide by its policy and grant him a gun and badge. At the trial court's direction, the plaintiff amended his complaint to assert a petition for writ of certiorari instead of a writ of mandamus. The defendant filed a motion to dismiss, asserting that the plaintiff was required to exhaust his administrative remedies before filing his lawsuit, and that he had failed to do so. The trial court granted the motion, dismissing the case on this basis. The plaintiff now appeals. We reverse, concluding that the municipality has not shown that the plaintiff was required to file an administrative grievance to appeal the denial of the gun and badge retirement benefit. We remand to the trial court for further proceedings in light of *Bernard v. Metropolitan Government of Nashville and Davidson County*, 237 S.W.3d 658 (Tenn. Ct. App. 2007).

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court is
Reversed and Remanded**

HOLLY M. KIRBY, J., delivered the opinion of the Court, in which ALAN E. HIGHERS, P.J., W.S., and DAVID R. FARMER, J., joined.

P. Brocklin Parks, Nashville, Tennessee, for the appellant, William Brewer.

Sue B. Cain, Lori Barkenbus Fox, and Jeff Campbell, Nashville, Tennessee, for the appellee, the Metropolitan Government of Nashville and Davison County, Tennessee.

OPINION

FACTS AND PROCEEDINGS BELOW

Petitioner/Appellant William Brewer (“Brewer”) was employed as a police officer for the Respondent/Appellee Metropolitan Government of Nashville and Davidson County, Tennessee (“Metro”) since 1981. He retired on January 31, 2006. At the time he retired, Brewer had approximately twenty-three years and ten months of active service. However, in accordance with the Metro Code, Brewer was permitted to use his accumulated unused sick leave as “service credit” in order to attain the 25-year status for retirement, even though he had actually worked for Metro for less than 25 years. Thus, Brewer was granted a “25 year service pension” in accordance with the rules and policies of the Metro Civil Service Commission and as approved by the Metro Department of Human Resources.

On April 13, 2006, Brewer’s legal representative wrote a letter to Metro Police Chief Ronal Serpas,¹ requesting that Brewer be given a gun and a badge as a benefit of retirement pursuant to Metro Code Section 2.44.110:

The Metropolitan Police Department shall make a gift of a gun and a badge to all retiring police officers who have at least twenty-five years of service upon their retirement. To be eligible to receive the gun and badge, the police officer must retire in good standing and be eligible to receive a service pension.

Metro denied this request because Brewer had factored in accumulated unused sick time to reach 25 years of service for pension purposes. Apparently, Metro’s denial was communicated verbally to Brewer.²

On May 10, 2006, Brewer filed a “Petition for Writ of Mandamus” in the trial court below, requesting that the court issue a writ directing Metro to comply with Section 2.44.110 and issue him a gun and a badge. Following a hearing,³ the trial court instructed Brewer to amend his complaint to seek a common law writ of certiorari, rather than a writ of mandamus. Accordingly, on August 11, 2006, Brewer filed an “Amended Petition for Common Law Writ of Certiorari” pursuant to Tennessee Code Annotated § 27-8-101, *et seq.*, claiming that Metro’s denial of a gun and badge was unlawful, and requesting that the trial court direct Metro to comply with Section 2.44.110 and issue him a gun and a badge.

¹ The letter was written on Brewer’s behalf by P. Brocklin Parks, General Counsel of the Fraternal Order of Police, Andrew Jackson Lodge, No. 5.

² On appeal, we may review only the documents in the appellate record. The pleadings indicate that the denial of Brewer’s request for the gun and badge retirement benefit was not reduced to writing.

³ The appellate record does not include a transcript of this hearing.

On December 21, 2006, Metro filed a motion to dismiss Brewer's amended petition for failure to exhaust his administrative remedies. Metro asserted in the motion that Brewer was required to appeal Metro's gun and badge decision to the Metro Civil Service Commission, pursuant to its grievance procedures, but he failed to do so. Brewer filed a response arguing, *inter alia*, that the grievance procedures referenced by Metro apply only to current Metro employees and did not apply to him as a retired employee. Brewer noted that the term "grievance" is defined in Metro's Civil Service Rule 6.9 as "[a]n employee's claim that he had been adversely affected by a violation, misinterpretation, misapplication or non-application of a specific law, ordinance, resolution, executive order, Civil Service Rule or written policy." Because he was no longer a Metro employee when his gun and badge request was denied, Brewer claimed, he could not avail himself of the administrative grievance procedures. He contended that "[t]here is, quite simply, no grievance procedure for former employees who have been wronged by their former employer's failure to comply with the law," and thus argued that he was not required to exhaust administrative remedies before filing his lawsuit.

On January 26, 2007, the trial court held an initial hearing on Metro's motion to dismiss.⁴ On February 5, 2007, the trial court entered an order holding the matter in abeyance pending the outcome of this Court's decision in *Bernard v. Metropolitan Government of Nashville and Davidson County*, 237 S.W.3d 658 (Tenn. Ct. App. 2007), a case involving similar facts.⁵ In *Bernard*, two Metro police officers filed a declaratory judgment action, seeking a declaration that they were entitled to the "gun and badge" retirement benefit pursuant to Metro Code Section 2.44.100.⁶ The trial court dismissed the case for lack of subject matter jurisdiction, holding that a declaratory judgment action was not the appropriate remedy, and that a common law writ of certiorari was instead the proper remedy. *Bernard*, 237 S.W.3d at 661.

On March 28, 2007, the appellate court issued its decision in *Bernard*, reversing the dismissal of the plaintiff's cause of action. The *Bernard* court held that a writ of certiorari is the proper remedy only when a "record" of administrative proceedings is available for the court to review. Because there was no such record, the appellate court held that an action for declaratory judgment was proper under Tennessee Code Annotated § 29-14-103. In reaching its conclusion, the appellate court in *Bernard* commented that there was "nothing in the record to indicate that [the officers] could have administratively appealed" the denial of the gun and badge benefit. *Id.* at 665.

⁴The appellate record does not include a transcript of this hearing.

⁵The trial judge in this case was also the trial judge in the *Bernard* case, and so was well familiar with the facts and issues in *Bernard*.

⁶The plaintiff officers in *Bernard* were denied their guns and badges because of Metro's position that they did not retire in "good standing." *See Bernard*, 237 S.W.3d at 559-61.

After the appellate decision in *Bernard* was filed, Metro's motion to dismiss in the instant case was reset for hearing. The hearing was held on June 20, 2008.⁷ On July 22, 2008, the trial court entered an order finding that "[Brewer's] claim to the gun and badge retirement benefit arises out of an alleged violation, misinterpretation, misapplication or non-application of an ordinance. Pursuant to Metropolitan Government Civil Service Rule 6.9, this type of claim is a 'grievance.' " The trial court observed that "the grievance procedure appears to be written as if it applies to those who are still employed." It recognized that there was a sixty-day deadline for filing such grievances; had Brewer filed a grievance instead of a lawsuit, his grievance would have been untimely, because more than sixty days elapsed between his retirement date (January 31, 2006) and the date on which he filed the lawsuit (May 10, 2006).⁸ In light of the absence of any specific provision in the Civil Service Rules addressing the steps that a retired employee such as Brewer should take in these circumstances, the trial court suspended the sixty-day deadline, remanded the case to the Metro Civil Service Commission, and held the court case in abeyance pending administrative adjudication of Brewer's claim.

On July 24, 2008, Metro filed a motion to alter or amend and/or for a final ruling on its motion to dismiss. Metro argued that the order should be altered because the trial court did not have authority to waive the Civil Service 60-day deadline for an administrative appeal. In the alternative, Metro requested that the trial court adjudicate the matter and enter a final order, so that the final order could be appealed.

On September 8, 2008, the trial court granted Metro's motion to alter or amend and dismissed Brewer's petition. The trial court reiterated that, while Brewer's claim was a "grievance," "the grievance procedure appears to be written as if it applies to those who are still employed." Upon reflection, the trial court concluded that "it may not have the authority to remand this case to the Civil Service Commission. Therefore [Metro's] Motion to Dismiss is GRANTED." From this order, Brewer now appeals.

ISSUES ON APPEAL AND STANDARD OF REVIEW

On appeal, Brewer argues that he was not required to exhaust administrative remedies or file a grievance with the Metro Civil Service Commission because, at the time he filed his complaint, he was no longer an "employee" of Metro. Alternatively, he argues, even assuming that he is an "employee" within the meaning of the term in the Department's grievance policy, he should be excused from the requirement that he exhaust administrative remedies.

In its motion to dismiss, Metro argued that Brewer's petition must be dismissed for failure to exhaust administrative remedies, and the trial court's order of dismissal appears to be based on

⁷ The appellate record does not include a transcript of this hearing.

⁸ A grievance must be filed "within sixty (60) calendar days after the event giving rise to the grievance." See Metro Civil Service Rule 6.9B.

this position. We consider the trial court's order to be either a dismissal pursuant to Rule 12.02(1) of the Tennessee Rules of Civil Procedure for lack of subject matter jurisdiction, or a Rule 12.02(6) dismissal for failure to state a claim upon which relief can be granted. *See Thomas v. State Bd. of Equalization*, 940 S.W.2d 563, 567 (Tenn. 1997). In considering such a motion to dismiss, the trial court, as well as this Court, must take all allegations in the complaint as true:

In considering a motion to dismiss, courts should construe the complaint liberally in favor of the plaintiff, taking all allegations of fact as true, and deny the motion unless it appears that the plaintiff can prove no set of facts in support of her claim that would entitle her to relief. *Cook v. Spinnaker's of Rivergate, Inc.*, 878 S.W.2d 934, 938 (Tenn. 1994). In considering this appeal from the trial court's grant of the defendant's motion to dismiss, we take all allegations of fact in the plaintiff's complaint as true, and review the lower courts' legal conclusions *de novo* with no presumption of correctness. Tenn. R. App. P. 13(d); *Owens v. Truckstops of America*, 915 S.W.2d 420, 424 (Tenn.1996); *Cook, supra*.

Stein v. Davidson Hotel Co., 945 S.W.2d 714, 716 (Tenn. 1997). "The concept of subject matter jurisdiction involves a court's lawful authority to adjudicate a controversy brought before it." *Northland Ins. Co. v. State*, 33 S.W.3d 727, 729 (Tenn. 2000). The issue of whether subject matter jurisdiction exists is a question of law subject to *de novo* review, with no presumption of correctness in the trial court's decision. *Id.*

ANALYSIS

This appeal presents the issue of whether a retired police officer who is denied the gun and badge retirement benefit must file a grievance with the Metro Civil Service Commission and exhaust administrative remedies before filing a lawsuit to obtain the benefit. While the facts in this case are similar to those in *Bernard*, the issue was not directly addressed in *Bernard*. We address the question as an issue of first impression.

In arguing that Brewer was required to exhaust administrative remedies before filing a lawsuit, Metro notes that the role of the Metro Civil Service Commission is to "hear administrative appeals and determine benefits to which an employee may be entitled." *Tidwell v. City of Memphis*, 193 S.W.3d 555, 562 (Tenn. 2006). Because Brewer's claim stems from the denial of a benefit of retirement, Metro contends, Brewer was required to first pursue a grievance and exhaust his administrative appeals with the Metro Civil Service Commission. As authority for this assertion, Metro cites the definition of "grievance" in Metro Rule 6.9, which provides:

An *employee's* claim that he has been adversely affected by a violation, misinterpretation, misapplication or non-application of a specific law, ordinance, resolution, executive order, Civil Service Rule or written policy.

(Emphasis added). Metro cites *Bush v. The Employee Benefit Board of the Metropolitan Government of Nashville and Davidson County*, 792 S.W.2d 932 (Tenn. Ct. App. 1990), and *State ex rel. Jones v. City of Nashville*, 279 S.W.2d 267 (Tenn. 1955), in support of its argument that Metro Rule 6.9 applies to former employees, as well as current employees.

In response, Brewer argues that the plain language of Rule 6.9 reveals that it applies to “employees,” with no indication that it is intended to apply to a “former” employee such as a retired police officer. He points out that Rule 6.9B provides that “[t]he first stage of any grievance consists of the employee’s oral or written presentation of his complaint to his immediate supervisor.” As a former employee, Brewer notes, he no longer has a “supervisor.” Therefore, he argues, this language does not show any intent to apply the rule to former employees. Brewer notes the trial court’s comment in its final order that “the grievance procedure appears to be written as if it applies to those who are still employed.” He argues that Metro has cited nothing in the applicable rules to indicate that he was required to file a grievance with the Civil Service Commission in order to challenge Metro’s denial of his gun and badge.

“Generally when a statute provides an administrative remedy, one must exhaust his administrative remedy prior to seeking relief from the courts.” *Thomas*, 940 S.W.2d at 566. However, unless exhaustion of remedies is mandated by statute, the requirement of exhaustion is a matter of judicial discretion. *Reeves v. Olsen*, 691 S.W.2d 527, 530 (Tenn. 1985). “In Tennessee, exhaustion is not statutorily required unless the statute ‘by its plain words’ requires it.” *Thomas*, 940 S.W.2d at 566 (quoting *Reeves*, 691 S.W.2d at 530). The dual purposes of the exhaustion doctrine “are to preserve the autonomy of administrative agencies and to promote judicial efficiency.” *Giovino v. Kincaid*, No. 01A01-9609-CV-00388, 1997 WL 122805, at *2 (Tenn. Ct. App. Mar. 19, 1997) (citing *McCarthy v. Madigan*, 503 U.S. 140, 144-45 (1992)). Thus, “courts should consider exhaustion questions on a case-by-case basis and should balance the respective interests of the administrative agency and the parties in light of the exhaustion doctrine’s purposes and the particular administrative process involved.” *Giovino*, 1997 WL 122805, at *3.

We agree with the trial court that Brewer’s claim arises out of an alleged violation, misinterpretation, misapplication or non-application of an ordinance, and thus fits within the definition of a “grievance” under Metro Civil Service Rule 6.9. Unquestionably, Metro has an interest in interpreting its own ordinances, and utilization of administrative procedures clearly promotes judicial economy.

However, we also agree with the trial court’s observation that the grievance procedure is written as though it applies to current employees. Reading Rule 6.9 in its entirety, the “plain words” of the rule consistently refer to “employees” and the procedures indicate that a grievance should first be filed with a “supervisor.” There is no alternate procedure for former employees or language that is inclusive of former employees.

In support of its argument that the grievance procedures are applicable to a former employee such as Brewer, Metro first cites *Bush v. Employee Benefit Board*, 792 S.W.2d 932 (Tenn. Ct. App.

1990). In **Bush**, an employee was injured in the line of duty and was placed on injury leave. When it was determined that he would not be able to return to work, the employee was granted a disability pension by the Metro Employee Benefit Board. The employee requested that he be awarded his accrued sick leave before the initiation of his pension payments, pursuant to the employee benefit provisions. *Id.* at 933. The Benefit Board denied the employee's request, based on the Metro Civil Service Commission's ruling that it had exclusive jurisdiction over such issues. The employee then filed a petition for a writ of certiorari in the chancery court. *Id.* The trial court reversed the decision of the Benefit Board based on the insufficiency of the evidence, not subject matter jurisdiction. Metro appealed. *Id.*

The appellate court in **Bush** stated that the "controlling issue" was whether the Benefit Board or the Civil Service commission had jurisdiction over the employee's request to use his sick leave. *Id.* at 932. Finding that the issue on the employee's sick leave was expressly addressed in a rule of the Civil Service Commission, the appellate court in **Bush** held that the Benefit Board did not have jurisdiction. *Id.* at 934. Thus, **Bush** is readily distinguishable from the case at bar. The petitioner in **Bush** was out on injury leave and sought to use sick leave before the initiation of his disability pension payments. Thus, at the time of this request, he would likely be considered an employee on leave rather than a terminated employee. In addition, the issue as presented to the appellate court in **Bush** was *which* administrative body had jurisdiction, not whether the employee was required to utilize administrative procedures before filing a lawsuit. Finally, the Civil Service rules specifically addressed the issue raised by the employee, indicating that the administrative procedures were intended to apply to him.

Likewise, in **State ex rel. Jones v. City of Nashville**, the petitioner was a city employee who had been laid off. **Jones**, 279 S.W.2d at 268. He sought to have back salary paid to him. The laid-off employee in **Jones** was required to avail himself of administrative procedures because the procedure for his administrative remedy was "contained in the document 'Rules respecting Lay-Offs, Civil Service Commission, adopted 7-16-51.'" *Id.* at 285. The **Jones** court noted that "Section 11 thereof . . . gives all the employees of the classified service who might be laid off the right within thirty days to appeal to the Civil Service Commission and have their cases reviewed." *Id.* Thus, the rules expressly set out procedures for the employee in **Jones** to file an administrative appeal. Clearly, then, both **Bush** and **Jones** are distinguishable from the case at bar.

In the instant case, there is good reason for Metro to adopt a procedure for administrative review of the denial of a non-monetary retirement benefit to a retired employee. However, Metro has not in fact done so. As observed by the appellate court in **Bernard**, "there is . . . nothing in the record to indicate that [the appellant retired police officers] could have administratively appealed the act of" denying the gun and badge retirement benefit. **Bernard**, 237 S.W.3d at 665. The definition of "grievance" and the procedures set out in Rule 6.9 refer to "employees" and contain no indication that they are intended to apply to a retired police officer who seeks to appeal the denial of the gun and badge benefit under Metro Code Section 2.44.110. As noted above, "exhaustion is not statutorily required unless the statute 'by its plain words' requires it." **Thomas**, 940 S.W.2d at 566 (quoting **Reeves**, 691 S.W.2d at 530). We do not find such a plan requirement in the Metro Rules

as they now exist. Therefore, we must conclude that Metro has not shown that Brewer was required to avail himself of the Metro Civil Service grievance procedures and exhaust his administrative remedies before filing a lawsuit to seek this non-monetary retirement benefit.

CONCLUSION

Thus, we must conclude that the trial court erred in dismissing Brewer's petition for failure to exhaust administrative remedies. In light of this holding, we reverse the decision of the trial court and remand for further proceedings. We note that, in the trial court below, Brewer amended his petition to seek a writ of certiorari instead of a writ of mandamus, and the record indicates that his petition was amended at the direction of the trial court.⁹ On remand, in light of *Bernard*, the trial court may consider any motion by Brewer to amend his petition to seek the appropriate remedy.¹⁰

The decision of the trial court is reversed and the cause is remanded for further proceedings consistent with this Opinion. Costs on appeal are to be taxed to the Appellee Metropolitan Government of Nashville and Davidson County, for which execution may issue, if necessary.

HOLLY M. KIRBY, JUDGE

⁹The trial court's instruction to Brewer was issued before the appellate decision in *Bernard*; the trial court's direction to Brewer was in conformity with the lower court's holding in *Bernard*.

¹⁰"The writ of mandamus is an extraordinary remedy, whose purpose is to exert the revisory appellate power over the inferior courts where there is no other plain, adequate, and complete method of obtaining the relief to which one is entitled." *Meighan v. US Sprint Commc'ns Co.*, 942 S.W.2d 476, 479 (Tenn. 1977) (citing *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980); 52 AM. JUR.2D *Mandamus* § 12 (1970)). Thus, if another legal remedy is equally convenient, complete, beneficial, effective, and sufficiently speedy, mandamus will not be issued. *Id.* The *Bernard* court found that a declaratory judgment was an appropriate legal remedy in this situation. Thus, if a declaratory judgment is deemed to be equally convenient, complete, beneficial, effective, and sufficiently speedy, then mandamus would not be appropriate.